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No. 93-96

In the Supreme Court of the United States

OCTOBER TERM, 1993

ADRIAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly declined to review the prosecutor's decision not to file a substantial assistance motion under 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1, which would have permitted the district court to depart downward at sentencing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Bolinger*, 940 F.2d 478 (9th Cir. 1991)	6
United States v. *Egan*, 966 F.2d 328 (7th Cir. 1992), cert. denied, 113 S. Ct. 1021 (1993)	8
United States v. *Favara*, 987 F.2d 538 (8th Cir. 1993)	8
United States v. *Higgins*, 967 F.2d 841 (3d Cir. 1992)	8
United States v. *Melancon*, 972 F.2d 566 (5th Cir. 1992)	6
United States v. *Romsey*, 975 F.2d 556 (8th Cir. 1992)	8
United States v. *Shrewsberry*, 980 F.2d 1296 (9th Cir. 1992), cert. denied, 114 S. Ct. 120 (1993)	8
United States v. *Urbani*, 967 F.2d 106 (5th Cir. 1992)	8
United States v. *Wiggins*, 905 F.2d 51 (4th Cir. 1990)	6
Wade v. *United States*, 112 S. Ct. 1840 (1992)	6, 7

Statutes and rule:

18 U.S.C. 3553(e)	6
21 U.S.C. 841(b)(1)(A)	4
21 U.S.C. 846	2
Sentencing Guidelines § 5K1.1	6-7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the judgment is noted at 988 F.2d 1217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1993. A petition for rehearing was denied on April 15, 1993. Pet. App. A4. The petition for a writ of certiorari was filed on July 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner pleaded guilty in the United States District Court for the Southern District of Florida to the charge of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. 3-4; Pet. App. A2. His arrest resulted from substantial cocaine purchases he made from a co-defendant, Lester Matchett. In early July 1990, confidential informant Larry Jackson had contacted Matchett and stated that he had 72 kilograms of nearly pure cocaine for sale. Jackson promised Matchett a $72,000 commission if Matchett could find a purchaser for the cocaine. Matchett thereafter contacted petitioner regarding the prospective deal.[1] Petitioner agreed to buy five kilograms of the cocaine for $17,000 per kilogram, with the understanding that petitioner would buy the remainder of the cocaine if he was satisfied with its quality. On July 17, 1990, petitioner gave Matchett $80,000 in cash that petitioner had taken from his safety deposit box. After removing his commission, Matchett delivered the remaining money to an undercover officer posing as Jackson's "supplier." Matchett was immediately arrested. He later cooperated with law enforcement officers and participated in a controlled delivery of six kilograms of cocaine to petitioner that resulted in petitioner's arrest and the seizure of approximately $196,000 in cash from petitioner's possession. Gov't C.A. Br. 4-6.

Following his arrest, petitioner told interrogating officers that he had trafficked in multi-kilogram quantities of cocaine on several previous occasions. Describing those episodes, petitioner stated that a man known as "Lamingo" typically brokered his purchases of cocaine

[1] Matchett knew that petitioner, a long-time acquaintance of his, had previously been involved in drug trafficking. Gov't C.A. Br. 3.

on credit from Colombian suppliers in Miami and that he subsequently sold the bulk quantities of cocaine in North Carolina to a man known as "Latcho." Although petitioner did not know the last names of either "Lamingo" or "Latcho," he provided officers with information that might aid their identification of "Lamingo" and "Latcho." Petitioner further provided the officers with the telephone numbers of the Colombians with whom he dealt. See Gov't C.A. Br. 7-11.

2. As part of his later plea agreement with the government, petitioner agreed that he would "cooperate fully" with federal authorities by "providing truthful information and testimony about any criminal offenses concerning which he has knowledge." R.E. Exh. C at 2.[2] The plea agreement further stated (*id.* at 3):

> The United States reserves the right to evaluate the nature and extent of [petitioner's] cooperation and to advise the court of the nature and extent of such cooperation at the time of sentencing. If, in the sole discretion of the United States, the circumstances of [petitioner's] cooperation warrant a departure by the court from the guideline and/or mandatory minimum sentence, the government may, but is not obliged to, make a motion pursuant to 5K1.1 of the Sentencing Guidelines and/or Title 18, United States Code, Section 3553(e), stating that [petitioner] has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

3. Prior to sentencing, the government informed petitioner's counsel that it did not consider petitioner's cooperation adequate to warrant the filing of a substantial

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[2] "R.E." refers to the Record Excerpts filed in the court of appeals.

assistance motion. Defense counsel then filed a "Motion to Mitigate or Reduce Sentence" that recited the information that petitioner had provided and alleged that the government violated its "good faith obligations under the plea agreement" by its "unwillingness to recognize [petitioner's] contribution[], because law enforcement [officers] did not catch a more important 'player' in the drug trade." See Gov't C.A. Br. 12-13. At sentencing, defense counsel moved for a downward departure on the ground that the government had acted in bad faith in refusing to file a substantial assistance motion. *Id.* at 13.

In response, the prosecutor explained that petitioner's cooperation was considered not to be substantial because (1) much of the information furnished by petitioner was already known to law enforcement authorities; (2) several arrests of drug suspects in North Carolina, for which petitioner claimed credit, had not been based on information provided by petitioner; (3) petitioner's cooperation was grudgingly given, marked by half-truths, and—on one occasion—deliberately calculated to shield the criminal activities of a suspect from discovery; and (4) many of the persons about whom petitioner offered information were his own couriers. See Gov't C.A. Br. 13-14. Although the quality of petitioner's cooperation did not merit the filing of a substantial assistance motion to permit a downward departure, the prosecutor nonetheless recommended that petitioner's cooperation be taken into account in setting his sentence within the applicable Guidelines range. *Id.* at 14.

After pertinent adjustments were made, petitioner's Guidelines range indicated a term of 188-235 months' imprisonment.[3] The district court refused to depart

[3] In addition, petitioner's offense of conviction was subject to a statutory mandatory minimum term of ten years' imprisonment. See 21 U.S.C. 841(b)(1)(A).

below the indicated range. Instead, it sentenced petitioner to 188 months' imprisonment, the lowest sentence it could have imposed within the Guidelines range.

4. The court of appeals affirmed in a brief per curiam opinion. Pet. App. A1-A3. The court of appeals recognized explicitly that this Court "has modified the absolute bar to sentencing courts examining the refusal of the government to file a motion for a downward departure based upon substantial assistance." *Id.* at A2. The court of appeals acknowledged that "such must be based upon an unconstitutional motive" on the part of the prosecutor. *Ibid.* Yet, because petitioner "simply failed to make a threshold showing of any such motive" under the circumstances of this case, the court of appeals held that the sentencing court "correctly concluded that it was without authority to consider the matter" of a downward departure based on petitioner's asserted cooperation. *Id.* at A2-A3.

ARGUMENT

The decision of the court of appeals is correct. Contrary to petitioner's assertions (Pet. 10-11, 13-14), the decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is unwarranted.

1. Under the terms of his plea agreement, petitioner specifically agreed that the government retained the "sole discretion" "to evaluate the nature and extent of [his] cooperation" and to determine whether "the circumstances of [his] cooperation warrant[ed] a departure by the court from the guidelines and/or mandatory minimum sentence." R.E. Exh. C at 3. Petitioner concedes that the government retained this discretion. Pet. 4. Moreover, petitioner "expressly waive[d] his right to appeal his sentence on any ground" and further "agree[d]

not to contest his sentence or the manner in which it was determined in any post-conviction proceeding." R.E. Exh. C at 4. A plea agreement that requires a defendant to waive all of his appeal rights is enforceable. See, *e.g.*, *United States* v. *Melancon*, 972 F.2d 566 (5th Cir. 1992); *United States* v. *Bolinger*, 940 F.2d 478, 479-480 (9th Cir. 1991); *United States* v. *Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990). Petitioner's agreement, which barred petitioner from appealing any alleged sentencing error, including the government's refusal to file a substantial assistance motion, was therefore valid and binding on him. Petitioner's waiver of his right to appeal the government's refusal to file a substantial assistance motion provided a sufficient basis for affirmance of his sentence.

2. In any event, a bare allegation by a defendant that he has provided substantial assistance to the government is not sufficient to trigger the government's duty to file a substantial assistance motion. Nor does such a bare allegation suffice to allow a court to depart downward in the absence of a motion by the government. Section 3553(e) of Title 18 provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Similarly, Sentencing Guidelines § 5K1.1 provides that a court may depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance" to the government. Both Section 3553(e) and Sentencing Guidelines § 5K1.1 "give[] the Government a power, not a duty, to file a motion when a defendant has substantially assisted." *Wade* v. *United States*, 112 S. Ct. 1840, 1843 (1992).

3. This Court recognized in *Wade* that a prosecutor's exercise of discretion under Section 3553(e) and Sentenc-

ing Guidelines § 5K1.1 is subject to limited judicial review: "we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." 112 S. Ct. at 1843-1844. As this Court explained, the government's refusal to file is subject to judicial review only if "the Government refused to file a motion for suspect reasons such as [the defendant's] race or his religion" or "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 1844. An allegation that a defendant provided substantial assistance but that the government failed to file a substantial assistance motion does not "entitle a defendant to a remedy or even to discovery or an evidentiary hearing," nor would "additional but generalized allegations of improper motive." *Ibid.*

The court of appeals correctly observed that petitioner "failed to make a threshold showing" that the prosecutor's refusal to file a substantial assistance motion was in any way predicated upon an unconstitutional motivation—whether involving a suspect category such as petitioner's race[4] or entailing an irrational basis. Petitioner particularly failed to demonstrate that the government's refusal to file a substantial assistance motion was arbitrary and hence unconstitutional in the sense that it "was not rationally related to any legitimate Government end." *Wade*, 112 S. Ct. at 1844. The

[4] Petitioner alleges (Pet. 8) that a federal agent stated that the government had neither the time nor the inclination to follow up on information supplied by petitioner concerning "wetbacks" who transported cocaine for petitioner. Even if given credence, petitioner's allegation fails to establish that the government's refusal to file a substantial assistance motion was based on suspect reasons that related to *his* race or ethnicity. See *Wade*, 112 S. Ct. at 1844.

explanation offered by the prosecutor at the sentencing hearing provided an entirely rational reason for the government's refusal to file a motion; petitioner himself tacitly recognized in his pleadings that the government's decision was predicated, at least in part, on the fact that "law enforcement did not catch a more important 'player' in the drug trade" as a result of petitioner's cooperation. See Gov't C.A. Br. 12. As the courts of appeals following *Wade* have held, an allegation based on a claim that the prosecutor incorrectly evaluated the significance of a defendant's cooperation falls far short of indicating a constitutional violation so as to permit judicial review of a prosecutor's refusal to file a substantial assistance motion. See, *e.g.*, *United States* v. *Favara*, 987 F.2d 538, 539-540 (8th Cir. 1993); *United States* v. *Shrewsberry*, 980 F.2d 1296, 1297-1298 (9th Cir. 1992), cert. denied, 114 S. Ct. 120 (1993); *United States* v. *Romsey*, 975 F.2d 556, 557-558 (8th Cir. 1992); *United States* v. *Higgins*, 967 F.2d 841, 844-845 (3d Cir. 1992); *United States* v. *Urbani*, 967 F.2d 106, 109-110 (5th Cir. 1992); *United States* v. *Egan*, 966 F.2d 328, 332 (7th Cir. 1992), cert. denied, 113 S. Ct. 1021 (1993).[5]

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[5] In *Urbani*, the court of appeals explained (967 F.2d at 110):

> [A]lthough a defendant might conceivably state grounds for relief by alleging that refusal to move for a departure under section 5K1.1 was "arbitrary" because it was based on his membership in an identified group, or on some [other] specified characteristic, that the government has no possibly legitimate grounds for treating in a discriminatory manner, Urbani's unadorned allegation of general arbitrariness must fail. * * * [I]t is difficult to see how his claim indicates anything more than his disagreement with the government's decision and an invitation to the district court to similarly disagree, which is exactly the type of judicial oversight that *Wade* * * * forbids as overly intrusive on the prosecution's broad discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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